provoked the consternation of Ong Hock Thye F.J. in *Loh Teck Chong* v. *Public Prosecutor*,[2] when he said in the course of his judgment:—

"Baldly stated, it dispenses completely with the need for expert evidence, so that, in effect, any policeman, however unversed in the ways of the bookmaker, or in any form of betting whatsoever, becomes qualified to testify in the capacity of expert on a subject in which he may be an absolute *ignoramus*, and his opinion, a simple *ipse dixit*, then suffices to raise a presumption of guilt until the contrary is proved by the helpless suspect. To say that I am astounded by this piece of legislation is to put it mildly. Parliament, it was said, can do anything except make a man a woman or a woman a man. The Act of 1961 must, I think, be an egregious instance of omnipotence, when the bray of an ass can be metamorphosed into the voice of the expert — the only limitation being that the policeman should have attained a certain rank, however he did it, including, of course, climbing up by the ageing process."

However, what in effect this section says is that 'evidence' given by a police officer touching the matter in question shall be deemed sufficient evidence of the fact. The section does not say that anything short of 'evidence' is sufficient evidence of the fact. It would, therefore, follow that if a police officer while purporting to give expert evidence bases his opinion on a hunch or intuition or where his opinion is unsupported by reason, the court is not debarred from rejecting that opinion as not being evidence within the meaning of that word under the provisions of the Evidence Ordinance.

In *Loh Teck Chong* v. *Public Prosecutor*, *supra*, where the appellant was charged under the same section of the Betting Ordinance as the respondent in this case, the learned magistrate had convicted him despite the evidence of the police expert who had frankly admitted that it was impossible for him to say that the marks on the racing programme related to bookmaking. It was because of that that Ong Hock Thye F.J. when allowing the appeal remarked that the appellant should have been acquitted at the close of the case for the prosecution. In the instant case the expert made no such admission.

The learned magistrate appears to have misdirected his mind on the facts and on the law. Just because there was a discrepancy in the evidence as to whether P5 was recovered from the respondent by P.W.1 or P.W.5 — a discrepancy which was later cleared up by the evidence — he came to the conclusion that the whole of the case for the prosecution was fabricated. This conclusion, in my opinion, is wholly unwarranted by the evidence. He further held that P.W.6 did not give any reason for his opinion why P1 was a record of stakes and horses. The entries are self-explanatory and requires no expert to say that they are a record of stakes and horses. What perhaps, the learned magistrate had in mind was that P.W.6 gave no reason why the entries in P1 related or appeared to relate to the business of a bookmaker. But P.W.6 did give his reason, namely, that only bookmakers gave a rebate on the amount staked and that it could be reasonably inferred from the entries in P1 that a rebate was given. The learned magistrate seems to have overlooked the relevant provisions of the Betting Ordinance which render it unnecessary for the prosecution, in order to establish a *prima facie* case, to prove anything more than that the document in question appeared to relate to bookmaking.

There must be a new trial in this case. The order of the learned magistrate acquitting the respondent is set aside and the case remitted to the court below for hearing before another magistrate.

New trial ordered.

Solicitors: *Skrine & Co.*

LEE YEW SENG & ORS. v. PUBLIC PROSECUTOR

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Ong Hock Thye F.J.) January 6, 1967]

[K.L. — Federal Court Criminal Appeal No. X.27 of 1966]

Evidence — Confession made by a person while in police custody — Inadmissibility of — Ample evidence independent of confession to justify conviction — Courts of Judicature Act, 1964, s. 71(2) — Evidence Ordinance, 1950, ss. 26 & 167.

The appellants were charged with robbing a goldsmith's shop. There was ample evidence at the trial to show that the appellants took active part in the robbery but at the trial a confession made by the first appellant while he was in the custody of the police was admitted in evidence. The appellants were convicted and they appealed.

Held: the confession was inadmissible and ought to have been excluded but as there was in this case ample evidence, independently of the confession, to justify the conviction, the improper admission of the evidence did not warrant an order for a new trial or a reversal of the decision of the trial judge.

FEDERAL COURT.

V. Jeyaratnam for the 1st appellant.

D. R. Seenivasagam for the 2nd & 3rd appellants.

Syed Agil Barakbah (Deputy Public Prosecutor) for the respondent.

Ong Hock Thye F.J.: These appellants were convicted in the High Court at Ipoh of robbing a goldsmith's shop in Kuala Kangsar of a considerable quantity of jewellery and cash and, for the aggravated offence committed during the night hours, were each sentenced to seven years imprisonment under section 392 of the Penal Code. Their appeals against conviction were dismissed for the reasons which we now state in detail.

One common ground in all three appeals was

the reception of inadmissible evidence highly prejudicial to the appellants. For the first appellant it was argued that no case had been made out at the close of the prosecution which required him to enter upon his defence; for the other two appellants counsel asked for a retrial.

A brief recapitulation of the prosecution evidence will suffice for the present purposes. A goldsmith's shop at No. 18 Jalan Datoh was broken into at about 4 a.m. on November 30, 1965 and the contents of two iron safes rifled comprising about $44,000 worth of assorted jewellery and $700 in cash. Parked on a nearby street was a motor-car, BJ. 2942, which aroused the suspicions of a passing police constable, Butte Khan, who kept watch and then went up to question a male Chinese when he attempted to enter the vehicle a few minutes later. This was the first appellant. Led by him the police constable proceeded along a lane to the back door of No. 18 Jalan Datoh. In response to a call by the first appellant two other persons came out and, when requested to accompany the police constable to the police station, they took to their heels and got away.

Although Butte Khan said he saw only one person leave by the back door — whom he readily identified as the third appellant at a subsequent identification parade — there is no doubt that three persons participated in the robbery. Witnesses to this effect were Lee Pak, the cook in the shop, who said he was overpowered and trussed up by three men, and Lam Cheang Hong, the occupier of the top floor, who saw one Chinese in the company of the constable and two others issue forth by the back door, the man in the rear carrying a bag.

In a drawer of one of the cracked safes the police discovered finger-prints of the second appellant. This fact was duly proved. He was also proved to be the purchaser of the motor-car BJ. 2942, in which were found his finger-prints, a quantity of the stolen jewellery, house-breaking implements and two pairs of shoes, which fitted the feet of the second and third appellants — a fact not challenged.

Once a nexus was established between the three appellants, the conclusion that each took an active part in the robbery becomes of course irresistible. Such nexus in our opinion was clearly proved by an abundance of evidence. At about 6 a.m., less than two hours after the robbery, three persons were found floating in the Perak river by a passing boatman, Salahuddin, who saved them from drowning when he fished them out of the water. He was able to identify the first appellant, though not his two companions, one of whom he remembered holding on to a bag, which resembled the one containing jewellery subsequently found by the police hidden under a pile of leaves in a nearby rubber estate.

At about 9 a.m. corporal Abu Bakar, while on the look-out for the robbers, with another policeman, Ithnian, saw three male Chinese emerge from a rubber estate, one of them carrying a bag. The three disappeared before he could apprehend them. Calling Ithnian to join him, the corporal then entered the rubber estate, where the constable discovered a bag hidden some distance from the road. This bag contained part of the stolen jewellery which was duly identified by the owner. Its contents, together with the jewellery found in the car, comprised the whole of the loot.

Shortly afterwards police constable Abdul Rahman found the first appellant in hiding on the edge of the rubber estate and after a brief chase arrested him. He was barefooted and his clothes were all wet. At about 4 p.m. on the same day, the second and third appellants were arrested by corporal Mohamed Baki near Salak Bahru, likewise barefooted and their clothing still damp.

All the evidence as above-stated was, of course, admissible and, without anything more, ample to establish a *prima facie* case against each of the appellants. Not content with such evidence, however, the prosecution further introduced a confession on the part of the first appellant implicating not only himself but also his two companions in crime. It is set out in the following passage of the judgment:—

> "Further, P.W.7 gave evidence, which I accept as being the truth, that when he went to the police station later that morning he saw accused No. 1 in the company of the O.C.P.D., Kuala Kangsar (P.W.19). On his own initiative, he went up to this man and asked him in Cantonese with whom he came to rob his shop. The answer from accused No. 1 was "Thin Saik, Ah Kow and I." Though P.W.7 said that he did not know what accused No. 1 meant, I am satisfied that accused No. 1 knew exactly the nature and purpose of the question and gave the names of his two fellow-robbers that morning. P.W.7 identified Thin Saik as the son of an employee and a former employee himself and pointed to accused No. 2. He did not know who Ah Kow was but that was the accused No. 3."

Such a confession was manifestly inadmissible and ought to have been excluded. Its maker was in the custody of a police officer and section 26 of the Evidence Ordinance clearly provides that whilst in such custody, no confession made by any person, unless made in the immediate presence of a president of the sessions court or magistrate, shall be proved against such person. There may be circumstances in which a confession made to a third person, not being a police officer, is admissible although made after a person is taken into custody: see the commentary to section 26 in *Sarkar* on Evidence. Here, however, the evidence clearly showed that the first appellant was in the company and custody of the officer commanding the police district when he made his confession.

Nevertheless, having regard to the provisions of section 167 of the Evidence Ordinance and section 71(2) of the Courts of Judicature Act, we held that the improper admission of the confession did not warrant an order for a new trial or reversal of the decision of the trial judge as we were satisfied that, independently of the evidence objected to, there was abundant evidence to justify the conviction.

The appeals were accordingly dismissed. As to sentence the first appellant had been on bail since March 30, 1966, while the other two had been in custody from the date of their arrest. In order that the sentence should not be unevenly apportioned, we have reduced the sentence of the first appellant to 6 years with effect from date of dismissal of this appeal while affirming the sentence for the others.

Appeals dismissed.

Solicitors: *Cheang Lee & Ong; S. Seenivasagam & Sons.*

CHAN TENG CHEONG v. PUBLIC PROSECUTOR

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Ong Hock Thye F.J.) January 6, 1967]

[K.L. — Federal Court Criminal Appeal No. X.35 of 1966]

Criminal Law and Procedure — Trial — Confession — Retracted confession — Direction of trial judge — Kidnapping Act, 1961, s. 3.

The appellant had been convicted of kidnapping a boy and he was sentenced to life imprisonment. The main grounds of appeal were (1) that the confession of the appellant recorded by a magistrate should not have been admitted, and (2) that the learned trial judge had failed to consider that the confession was retracted.

Held: (1) on the facts the confession was rightly admitted in evidence;

(2) the learned trial judge had sufficiently warned the assessors that they may reject the confession if they considered it was not true and this was a sufficient direction even though he did not warn the assessors that the confessoin had been retracted.

Cases referred to:—

(1) *Yap Sow Keong & Anor.* v. *Public Prosecutor* [1947] M.L.J. 90.

(2) *Sinaraju* v. *Public Prosecutor* [1961] M.L.J. 33.

FEDERAL COURT.

D. R. Seenivasagam for the appellant.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

Azmi C.J. (Malaya): The appellant was charged as follows:

"That you on the 29th day of November, 1965, at about 7.40 a.m. in front of Cator Avenue Primary School, Ashby Road, Ipoh, in the State of Perak, with intent to hold one Tay Yew Mun, aged 10 years for ransom, did abduct the said Tang Yew Mun, and you thereby committed an offence punishable under section 3(1) of the Kidnapping Act No. 41 of 1961."

and convicted by the court and sentenced to life imprisonment.

The facts of the case may be summarised as follows. On 29th November 1965, Tang Yew Mun aged 10 whilst on his way to school was abducted and confined in a vacant house in Ipoh. He was left alone in the house after the three kidnappers had tied up his hands and feet with pieces of wire and he was also blindfolded.

He, however, subsequently managed to escape and was taken to the hospital. Medical evidence showed that the injuries on the boy's arm and ankles were consistent with those parts of his body being tied with pieces of wire.

The boy's father Dr. Tang Sek San was informed of this incident and he immediately went to the hospital.

On 1st December 1965, Dr. Tang received a letter (exhibit P.9), purported to be signed by one Soong Kong dated 30th November 1965. The letter said that the gang originally intended to hide his son and then to demand a ransom of $100,000 but admitted that the attempt had failed.

On 19th January 1965 an unknown person telephoned Dr. Tang's house and spoke in Cantonese. His wife P.W.4, answered the telephone. She insisted on knowing the reason why he wanted to speak to her husband and when he refused to give his name although she asked him several times, she suspected that this person must be connected with the kidnapping of her son. Then when she spoke again on the telephone the voice said that he took part in the kidnapping of the boy. While she was still speaking, the doctor went to the house across the road and rang up the police. The doctor came back and took over the telephone from his wife. The voice admitted he was a member of the kidnap gang but said that it was through his help in failing to carry out the original plan of the gang in not securely tying the boy's hands or in putting sticking plaster on the boy's eyes or in giving him sleeping tablets, that the boy managed to escape. He then demanded $5,000 as a reward and he also promised that he would keep the doctor informed of future action of the gang. The voice also asked the doctor to place the money at a certain agreed place.

At the request of the police, the doctor placed a packet purporting to be the reward money at the agreed place but apparently nobody came to get it.

Subsequently the same day the same person telephoned the doctor again and without disconnecting the call the wife went to the house